1992 (62) ELT 495

GUJARAT HIGH COURT

Hon'ble Judges:A.P.Ravani and J.M.Panchal JJ.

Mahendra Mills Limited Versus Union Of India

Special Civil Application No. 3082 of 1981 ; *J.Date :- DECEMBER 17, 1991

- CENTRAL EXCISE ACT, 1944 Section - 11B

Central Excise Act, 1944 - S. 11B - refund - assessee company paid duty due to wrong inclusion of goods - refund demanded after period of 6 years - conditions for recovery - held, three conditions should be fulfilled for recovery (i) mutual mistake by parties (ii) duty paid under coercision or pressure (iii) if not paid back it would result in legal injury and prejudice - in instant case no injury caused to assessee, refund can be claimed within period of limitation.

Imp.Para: [4] [5] [6]

Cases Referred to :

1. Orissa Cement Ltd. V/s. State Of Orissa, AIR 1991 SC 1676
2. Union Of India V/s. M:s. Wood Papers Ltd., 1991 ELT(Guj.) 189
3. Wigman Electrical Engineering (Pvt.) Ltd. V/s. Union Of India, 1992 ELT 447

Equivalent Citation(s):

1992 (62) ELT 495 : 1991 GLHEL_HC 218988

JUDGMENT :-

A.P.Ravani, J.

1 Petitioner No. 1 is a Mill Company and Petitioner No. 2 is the Managing Director thereof. The petitioner Mill Company is engaged in the business of manufacturing both cotton and man-made fabrics. On March 1, 1961, Tariff Item No. 18A was added to the First Schedule to the Central Excises & Salt Act, 1944 providing for levy of duty on cotton twist, yarn and thread of all sorts. The petitioner company started manufacturing blended yarn with the combination of 67% man-made fibre and 33% cotton fibre in the year 1966. The department levied excise duty considering that the product was falling under Tariff Item No. 18 which pertained to man-made fabrics, filament yarn and cellulosic spun yarn. According to the petitioner company, the blended yarn manufactured by it would not fall either in Tariff Item No. 18 which refers to man-made fabrics, filament yarn and cellulosic spun yarn or in Tariff Item No. 18A which refers to cotton yarn.

2 The First Schedule to the Act was amended by Finance Act of 1972 when Tariff Item No. 18E was introduced. The petitioner contends that it came to know about the decision in

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Special Civil Application No. 1058 of 1972 filed by the Ahmedabad Manufacturing and Calico Ptg. Co. Ltd. challenging the legality and validity of levy of duty on blended yarn prior to the period of 1972 only recently. Be it noted that the decision was rendered in the aforesaid petition on January 15, 1976. While this petition is filed on July 29, 1981.

3 The petitioner contends that as per the provisions of Sec. 11B of the Central Excises & Salt Act, 1944, the petitioner would not be in a position to claim refund of duty paid because the said provisions prescribe limitation period of six months only. According to the petitioner it has paid an amount of Rs. 8,03,369.00 as and by way of excise duty on blended yarn manufactured by it during the years 1962 to 1972 and the respondents could not have collected tax otherwise than in accordance with law and therefore the collection of duty being unconstitutional, the petitioner company is entitled to claim refund. It is prayed that this Court should exercise its power under Article 226 of the Constitution of India and order the department to refund the aforesaid amount.

4 As far as the challenge to the constitutional validity of Sec. 11B of the Act is concerned, the question is decided against the petitioner by a Division Bench of this Court in the case of Wigman Electrical Engineering (Pvt.) Ltd. V/s. Union of India, reported in 1992 (61) E.L.T. 447 (Guj.) = 1991 (2) G.L.R. 269. We are in agreement with the reasons given and conclusion arrived at in the aforesaid judgement. For the reasons stated therein, the challenge to the constitutional validity of Sec. 11B of the Act cannot be sustained.

5 As far as the question of exercise of power under Article 226 of the Constitution of India is concerned the power cannot be exercised for the simple reason that in the instant case, the petitioner has not even made out a case for entitlement to the refund. As held by this Court in the case of Dhangadhra Municipality V/s. Dhangadhra Chemical Works - 29 (1) G.L.R. page 388 and in the case of Union of India V/s. M/s. Wood Papers Ltd. - 1991 (53) E.L.T. 189 (Guj.) = 30 (2) G.L.R. page 1323, for claiming restitution the petitioner/plaintiff is required to prove the following three ingredients :

> (1) that the amount was paid under a mistake to the defendant and that at the time of payment, both the plaintiff as well as the defendant were labouring under mutual mistake;
>
> (2) that the amount was paid by the plaintiff under coercion, compulsion or pressure from the defendant; and
>
> (3) that if restitution is not granted to the plaintiff the plaintiff would suffer legal injury or prejudice.
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> If one reads the observations made by the Division Bench of this Court in the case of Dhangadhra Municipality (supra) instead of plaintiff if one reads petitioner, the proposition laid down therein squarely apply to the facts and circumstances of this case also. In view of the aforesaid proposition laid down by the Division Bench of this Court, the petitioner in order to succeed to sustain the claim under Section 72 of the Contract Act, 1872 must prove that the petitioner had made payment under mistake of law or, that under coercion, compulsion or pressure. The petitioner is also required to prove that if restitution is not granted, the petitioner would suffer legal injury or prejudice. As far as the legal injury is concerned, no such case is made out in the petition itself. This is bound to be so, because duty of excise is an indirect tax.

> Economists call it to be a commodity tax. It is the commodity which bears the burden of tax. It goes with the commodity and ultimately the consumer of the commodity suffers the burden of the tax. Only an unwise businessman would suffer the burden of such taxes. This is the reason why it is not even averred in the petition that the petitioner has suffered legal injury or has been prejudiced on account of the payment of duty under the mistake of law. Thus it is not only account of the equitable doctrine of unjust enrichment that the petitioner may be denied the relief. But it is also on account of the failure to fulfil the conditions to succeed while making claim under Section 72 of the Contract Act. For the aforesaid reasons, the claim for refund cannot be granted and the petition is required to be rejected.

6 Even assuming for a moment that the petitioner's case is required to be considered on the basis that the petitioner has been able to prove all the ingredients of Section 72 of the Contract Act, then also, it would not be proper for this court to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India to grant relief to the petitioner after a period of about six years. Again it may be noted that in the case of Orissa Cement Ltd. V/s. State of Orissa, reported in A.I.R. 1991 S.C. page 1676, the Supreme Court inter alia observed that even in cases where the provisions of law are declared to be invalid, the grant of relief of refund of the amount of tax collected need not automatically follow. The Supreme Court has further observed as follows :-

> "One of the commonest issues that arose in the context of the situation we are concerned with is where a person affected by an illegal exaction files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law. In such a case, the Court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. If even this instance is sought to be distinguished as a case where the Court's hands are tied by limitations inherent in the former forum in which the relief is sought, let us consider the very case where a petitioner seeks relief against an illegal exaction in a writ petition filed under Article 226. In this situation, the question has often arisen whether a petitioner's prayer for refund of taxes collected over an indefinite period of years should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which, prima facie, is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of Courts in answering the above question in the affirmative."

7 In above view of the matter, on each of the grounds stated above it would not be proper to grant relief under Article 226 of the Constitution of India and direct the department to refund the amount of tax collected. No other contention be raised.

8 There is no substance in the petition. Hence rejected. Rule discharged.

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